**General Motors Corporation, Inland Division *and* Local Union No. 87, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC.** Case 9-CA-15273

August 17, 1981

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

On May 1, 1981, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed cross-exceptions and a brief in opposition to the General Counsel's exceptions and in support of Respondent's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Administrative Law Judge inadvertently stated that in *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815 (1975), the Board found no significant detriment to unit employees from the subcontracting of certain work. We note that the Board at fn. 1 did not pass on that issue since no exceptions were filed with regard thereto.

[2] In adopting the Administrative Law Judge's Decision, Member Jenkins adheres to the view set forth in his separate concurring opinions in *Westinghouse Electric Corporation (Mansfield Plant)*, 150 NLRB 1574 (1965), and *General Electric Company*, 240 NLRB 703 (1979).

## DECISION

### STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Dayton, Ohio, on February 2 and 3, 1981, upon a charge filed by Local Union No. 87, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, herein called the Union, on May 1, 1980, and a complaint issued on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 9 on June 19, 1980. The complaint alleges that General Motors Corporation, Inland Division, herein called Respondent or Inland, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act, by unilaterally subcontracting unit work without notice to, or bargaining with, the Union. Inland's timely filed answer and amended answer deny the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT

#### I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS; PRELIMINARY CONCLUSIONS OF LAW

Respondent is a Delaware corporation engaged in the manufacture of automotive parts at its facilities in Dayton and Vandalia, Ohio. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent's production and maintenance employees[1] are represented for collective-bargaining purposes by the Union. The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICE

##### A. *The Subcontracting*

Inland manufactures parts for General Motors' automobiles. As of September 1979, it had approximately 6,900 employees on the job of whom perhaps 300 were engaged in the manufacture of various kinds of ball joints. Of those, two or three spent a portion of their time manufacturing ball joints for the Corvette automobile and for certain replacement or service installations, the ball joint manufacture involved herein. By May 1980, due to layoffs, Respondent's work force was reduced to about 5,000, of whom approximately 200 produced ball joints.

About September 1979, Respondent began to examine its plant facilities to find prime manufacturing floor space, i.e., space with a solid base and a high bay or ceiling, in which to place new machinery to be used in the manufacture of parts for GM's line of "J" cars about to be introduced. It determined that the space it desired to use was the space then occupied by the machinery for the manufacture of the Corvette and service ball joints. According to Respondent's superintendent of production engineering, that space was not being used efficiently and its acquisition for the J car work required the removal of only a few machines. The decision to move out

[1] Respondent admits that its production and maintenance employees, more extensively described in the complaint and in the parties' collective-bargaining agreement, constitute a unit appropriate for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

the Corvette and service ball joint operation was made in September 1979.

On March 18, 1980, the machines involved in the manufacture of the subject ball joints were removed from the Inland plant and delivered to GWF Industries, Inc., on consignment, expressly for the purpose of manufacturing these ball joints. In mid-April 1980, GWF submitted samples to Respondent's purchasing department and, on April 24, 1980, executed a contract to fulfill all of Respondent's needs for these particular ball joints for an extended period. GWF bought the raw forgings from Inland, trucked them to its own plant about 25 miles away from Respondent's plant, and machined them on the equipment consigned to it by Inland. It began to sell and ship the completed ball joints to Inland on May 2, 1980. Since then, it has produced and shipped approximately 10,000 to 11,000 pieces per month.

Respondent's total daily production of ball joints assemblies is approximately 130,000. The production subcontracted to GWF accounted for less than 600 per day.

GWF is a corporation formed in October 1979 by George W. Francis who retired as Inland's plant manager in November 1977. Among Francis' initial employees was Frank Brigitzer, a retired employee who, prior to his retirement, had worked on the subject ball joints.

Respondent did not notify the Union of, or bargain with the Union about, the subcontracting of this work. The Union learned about it from employees after the machinery had been removed and first questioned it in a meeting with Respondent's director of labor relations, Charles Wallis, on March 28, 1980. That was also the first that Wallis had heard of it.

In Respondent's plant the subject ball joint work had been performed on an as-needed basis; no employees worked consistently at that task. Charles Henry, foreman of the department where the work had been performed, estimated that it required the time of two or three employees for approximately 1 week out of each month. Respondent's witnesses estimated, based on timestudies, that an entire year's production of these parts required approximately 40 to 50 percent of an employee work year (2,080 hours).[2] From the time that GWF acquired the contract for these ball joints until about the end of January 1981, its employees worked approximately 1,072 hours.[3] Initially, GWF returned its tools to Inland for sharpening. Thereafter, it sent the tools out to a contractor for sharpening and paid for approximately 178 hours of such work. It also paid for 8 to 10 hours of machine maintenance.

None of the Inland employees who had previously worked on the subject ball joints was laid off as a direct result of the subcontract. One, Brigitzer, had retired prior to the subcontract. He was not replaced. Another, Mayabb, was transferred from the first to the second shift where, because of his familiarity with certain clutch and spring work which was being increased, he was needed. Henry testified that Mayabb's shift change would likely have occurred even without the loss of the subject ball joint work. A third employee who had sometimes worked on these ball joints, Hisel, was assigned to a clutch job on April 21, 1980, and his rate of pay was reduced from $9.60 per hour to $9.46 (until September 15, 1980). Additionally, one of the department's group leaders, Leistner, went on sick leave on April 10, 1980, and subsequently retired; there was no need to replace him.

In April 1980, there was a reduction in force among Respondent's toolroom and machine repair employees. At least one employee was laid off.

It is obvious that, had Respondent retained the subject ball joint work, there would have been some greater amount of work available for unit employees in both direct and indirect labor positions. I cannot conclude from this record, however, that such retention would have obviated the need for any layoffs, required that any laid-off employees be recalled, prevented any transfers, or maintained the need for any group leaders.

By the time of the hearing herein, placement of the new machinery related to the J car had created 16 jobs. Respondent estimated that, when fully installed, the new machinery would provide about 21 positions.

### B. *Relevant Contractual Provisions*

Respondent and the Union have had a succession of collective-bargaining agreements. The current agreement is effective from November 5, 1979, through September 14, 1982. It provides, *inter alia*, the following:

> (6) The right to hire; promote . . . and to maintain discipline and efficiency of employees, is expressly recognized as the sole responsibility of the Company except that Union members shall not be discriminated against as such. In addition, the products to be manufactured, the location of plants, the schedules of production, the methods, processes and means of manufacturing are solely exclusively the responsibility of the Company.

The contract contains no other provisions directly related to the subcontracting of production work. By comparison, however, in regard to the skilled trades, the contract provides the following:

> (62y) (1) Employes of an outside contractor will not be utilized in a plant covered by this Agreement to replace seniority employes on production assembly or manufacturing work, or fabrication of tools, dies, jigs, and fixtures, normally and historically performed by them when performance of such work involves the use of Company-owned machines, tools, or equipment maintained by Company employees.
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> (4) In all cases, except where time and circumstances prevent it, Management will hold advance discussion with and provide advance, written notice

[2] Additionally, there would be time spent by those in indirect labor, including tool grinders. According to Henry, a full day's production of the subject ball joints might require a couple of hours of a tool grinder's time to sharpen the tools used.

[3] This figure includes some time spent on nonproductive duties and does not include Francis' time.

> to a specified member of the Local Union's Skilled Trades and Apprentice Committee or the District Committeeman representing Maintenance Department employes who work in the plant located nearest the Company's Main Purchasing Office, and the Chairman of the Shop Committee, prior to letting a contract for the performance of maintenance and construction work.
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> (5) In no event shall any seniority employee who customarily performs the work in question be laid off as a direct and immediate result of work being performed by an outside contractor on the plant premises.

The contract also includes, as appendixes, letters setting forth the Company's position that it has the right to decide whether or not to perform maintenance and skilled trades work itself or through outside contractors, with assurances that Respondent "expects to continue its general operating policy of placing primary reliance on its own skilled trades employes to perform maintenance to the extent consistent with sound business practice, as in the past."

According to Wallis, the subcontracting of production work has been the subject of collective-bargaining negotiations in each round of contract talks since at least 1967 when he became Respondent's chief negotiator. In those negotiations, he said, Inland has consistently taken the position that the subcontracting of production work was a management right protected under paragraph 6 of the agreement, quoted above, encompassed within the language providing that "the products to be manufactured . . . are solely exclusively the responsibility of the Company."

In 1979, during negotiations for the current agreement, the Union made the following demands relative to subcontracting:

> 96. Establish plant closure clause. Employes laid off due to full or partial plant closure, or sending work historically done by Inland employes out to be manufactured by other concerns will be paid a lump severance award of $1,000.00 per year credited service, plus full retirement benefits for life with no restriction on additional earnings after retirement.
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> 106. Stop all use of outside contractors and update machinery and equipment to permit our people to do work. Stop contracting out production work. *Note*: Want all jobs protected against outside contractors. Company failure to stop using contractors is strikeable issue!
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> 114. Return all jobs presently in outside job shops back to the plant. . . .
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> 155. All work previously done by Department 54 employes that is now being done by outside concerns must be returned to Department 54 Tractor Trailer Operators (Truck driver's classification).

Despite the language contained in the quoted demands, particularly items 106 and 114, Union President William H. Hutchins maintained that all these demands related only to subcontracting of skilled trades and trucking work or to rumors of the establishment of a new plant by Respondent in Mexico.

Respondent's answer to all of the above-quoted demands was the same; it recommended that the Union withdraw them from the table. However, according to the memorandum of understanding issued in regard to the most current contract, it did agree to use its Department 54 employees for the transportation of "in process material" being moved from, or returned to, the Inland Division in the Dayton area as well as for the transportation of Inland production material between Inland in-plant locations. It further agreed that noncommon carrier air freight would normally be transported by Department 54 employees if drivers and equipment were available and there were no emergencies precluding such utilization. To the extent that the Union's demands sought restrictions on the subcontracting of other than skilled trades or trucking work, no agreements were reached.

### C. *Past Practices*

According to Wallis, Inland has been subcontracting production work since at least 1965. For at least the last 5 years, the Union has been filing grievances over such subcontracting. Thus, for example, in April 1975 two grievances were filed protesting the subcontracting of floor care work to an outside janitorial firm. Respondent denied them on the basis of its past practices and the absence of any adverse impact on unit employees. In February 1977, the Union protested the subcontracting of cleaning work in Department 310. Inland responded, denying the grievance on the basis of the unavailability of required special equipment and the absence of any adverse impact. The Union withdrew this grievance with prejudice. However, according to the Union's witnesses, unit employees are again doing this work. Grievances were filed in December 1977 and May 1978 by shipping department employees protesting the use of outside contractors to store and ship service parts. Inland's answer denied the grievances on the basis of its past practices, its economic justification for the action taken, and the absence of any impact upon unit employees. Union President Hutchins testified that this work was ultimately brought back when Inland opened new warehouse facilities. In January 1978, the Union protested the subcontracting of packaging work. In denying the grievance Inland relied on paragraph 6 of its collective-bargaining agreement and the absence of adverse impact. According to Wallis, this particular subcontract was entered into be-

cause the packaging work involved an inefficient use of floor space and was only a part-time operation. Darrell Collins, chairman of the Union's shop committee, testified that this particular grievance and others on the same subject were settled in the 1979 negotiations with backpay or makeup work for the employees. In October 1979, the Union grieved the subcontracting of certain rubber-making work in Department 310. Once again, Respondent cited paragraph 6 of its collective-bargaining agreement to justify its actions. Of particular significance is a grievance filed on October 27, 1978, protesting removal of machinery and equipment to manufacture dust cells and the subcontracting of that work. In rejecting the Union's grievance, the foreman stated:

> It is true that we have removed some equipment from Dept. 248-249 that produced and finished dust cells. This is necessary so that the Dept. can free up adequate floor space to take on new business. . . .

The supervisor added that the removal was necessary "to make room for new business . . . [that] will more than make up for the people that were displaced in the change" This grievance was ultimately withdrawn without prejudice. Hutchins claimed that there was no impact upon unit employees at that time because the Company was in a hiring situation. Wallis disputed that assertion. No objective evidence was offered to support or contravene either position.

Hutchins further testified that the Union would not know of Respondent's subcontracting unless something specifically brought it to the Union's attention. When asked why the Union would not be aware of subcontracting, he testified that it was "because the Company had never contacted us in the past [about subcontracting] . . ."; Inland "had never made [the Union] aware in advance of anything going out."

### D. *Analysis and Conclusions*

In *Westinghouse Electric Corporation (Mansfield Plant)*, 150 NLRB 1574 (1965), the Board, in amplifying upon *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964), made clear that *Fibreboard* did not lay down "a hard and fast rule to be mechanically applied." It set forth, at 1577, five criteria to be considered in determining whether unilateral subcontracting violated Section 8(a)(5) of the Act: Whether the subcontracting "was motivated solely by economic considerations"; whether it "comported with the traditional methods by which the Respondent conducted its business operations"; whether the subcontracting in question varied "significantly in kind or degree from what had been customary under past established practice"; whether "the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings"; and, whether the subcontracting had any "demonstrable adverse impact on employees in the unit." These criteria, the Board has held, are to be weighed and considered cumulatively. See *General Electric Company*, 240 NLRB 703 (1979); *Rochester Telephone Corporation*, 190 NLRB 161 (1971); and *Union Carbide Corporation, Carbon Products Division, Clarksburg Works*, 178 NLRB 504 (1969). As stated in *Shell Oil Company*, 149 NLRB 305, 307 (1964), "the permissibility of unilateral subcontracting will be determined by a consideration of the setting of each case."

In the instant case, I am convinced that Respondent's subcontracting clearly satisfies the first four tests enumerated above. There is no contention that the subcontracting of the subject ball joint manufacture was motivated by other than economic considerations. The record also establishes that Respondent has been subcontracting various kinds of work, including production work, for many years. I take note, for example, of the grievances filed in 1978 and 1979 in regard to subcontracting of rubber making, packaging, and the manufacture of dust cells. I note further that like the subcontracting of the subject ball joint manufacture, the subcontracting of the dust cells involved the removal of machinery from Respondent's plant, and the subcontracting of the packaging work involved an inefficient use of space. Moreover, it has been Respondent's practice to enter into these subcontracts unilaterally. Thus, even Union President Hutchins acknowledged that Inland did not notify the Union in advance about any work that was "going out." Respondent, he said, never contacted the Union about subcontracting. I must conclude, therefore, that the subcontracting involved here was at least not inconsistent with Respondent's traditional methods of doing business or with its past practices. I must reject as entirely too narrow the General Counsel's contention that this particular subcontract varied from Respondent's past practices because the record did not establish a specific history of subcontracting the manufacture of these or other ball joints.

Additionally, I find that the Union had, and exercised, the opportunity to bargain about changes in Respondent's existing subcontracting practices in the negotiations. That question has been raised in every recent round of negotiations. Proposals were made and there is no evidence that Respondent refused to discuss them.[4]

These discussions failed to produce an agreement to limit the subcontracting of production work; they have, however, given rise to agreements limiting Respondent's subcontracting of skilled trades work. In this regard, although there exists a substantial difference in the number of subcontracts involved, this case is not dissimilar from *Westinghouse, supra*.[5]

The most difficult issue to be resolved here is whether Respondent's subcontracting had "demonstrable adverse impact upon" unit employees; i.e., whether it "resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for

[4] The General Counsel's contention that the Union's proposals in 1979 did not pertain to production work is contradicted by the plain meaning of those proposals, particularly item 106.

[5] Respondent also contends that the Union had consciously waived its right to restrict the subcontracting of production work. I cannot agree. "The law is settled that the right to be consulted concerning changes in conditions and terms of employment . . . is a right given by statute and not necessarily one obtained by contract. To establish a waiver of such a right there must be a showing of clear relinquishment . . . ." *Aeronca, Inc.*, 253 NLRB 261, 261-264 (1980). No such clear relinquishment has been established here. See also *Perkins Machine Company*, 141 NLRB 98 (1963).

those in the bargaining unit." *Union Carbide, supra* at 508; *Westinghouse, supra* at 1576. Respondent's subcontract resulted in the unit's loss of approximately one-half of an employee's work year in production work and perhaps one-quarter as much in such skilled trades work as tool sharpening. No employee lost a job as a direct result of the subcontract; however, by reducing the number of hours of work available, that subcontract at least contributed to the factors requiring the transfer of one employee to another shift, the reassignment of a second to a job at a slightly lower rate of pay, and the layoff of a third, a toolroom employee. It also may have contributed to the reduced demand for employees and leadership which caused Respondent not to replace certain retired employees, including a group leader. On the positive side of the ledger, by opening up space for new work, the subcontract facilitated the ultimate increase in work available so as to provide between 16 and 21 new jobs.[6]

In *Union Carbide, supra*, the Board found that subcontracting of production work while unit employees were on layoff status did not cause a significant detriment in unit work opportunities. There, like here, the facts did not warrant a conclusion that any laid-off employees were not recalled or were recalled late because of subcontracting. The work involved was not regularly assigned or scheduled and/or provided less than full-time employment. See also *Central Soya Company, Inc.*, 151 NLRB 1691 (1965), wherein it was held that subcontracting while employees were on layoff status involved no significant detriment inasmuch as the record failed to establish that the laid-off employees were qualified to do the subcontracted work.[7]

Further, in both *Rochester Telephone Corporation*, 190 NLRB 161 (1961), and *American Oil Company*, 171 NLRB 1180 (1968), the Board found no significant detriment in subcontracting or other changes which resulted, at most, in the loss of overtime opportunities. In *American Oil*, the unit employees lost the opportunity to work approximately 5,700 hours of premium-rated work, about 9 percent of the total of that work for the period. By comparison, the subcontracted ball joint work represented less than one percent of Respondent's ball joint production. Similarly, in *George Webel d/b/a Webel Feed Mills and Pike Transit Company*, 217 NLRB 815 (1975), no significant detriment was found in the subcontracting of delivery work which affected no specific unit jobs but deprived the unit as a whole (five employees) of 4 to 6 hours of work per day.[8]

Viewing the instant case against the background of the cited Board precedent, I am constrained to conclude that the detriment to the unit employees caused by Respondent's subcontracting of the subject ball joint manufacture was not sufficiently significant as to mandate notice and bargaining. Thus, Respondent has satisfied all five of the *Westinghouse* criteria. Accordingly, and notwithstanding that Respondent had ample time to notify and bargain with the Union prior to the effectuation of the subcontract, that such bargaining might have permitted Respondent to achieve its objective of acquiring space for the J car ball joint manufacture without the loss of unit work or satisfied the Union that to do both was impossible, and notwithstanding that by frank and open notice and discussion Respondent might have created a situation more conducive to increased productivity than to grievance filing and litigation,[9] I shall recommend that the complaint be dismissed.

Upon the entire record, I make the following:

## CONCLUSION OF LAW

Respondent has not violated the Act in the manner alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

## ORDER[10]

The complaint herein is dismissed in its entirety.

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[6] It is, of course, entirely possible that by engaging in collective bargaining the parties could have found a way both to retain the subject work and to create the new jobs.

[7] *Gerald F. Hinkle d/b/a Akron Novelty Manufacturing Company*, 224 NLRB 998 (1976), and *Howmet Corporation, Austenal Microcast Division*, 197 NLRB 471 (1972), cited by the General Counsel for the proposition that subcontracting while unit employees are laid off is violative of Sec. 8(a)(5), are factually distinguishable. In both, the subcontracting occurred in a context of other unfair labor practices, including discrimination and bad-faith bargaining, and shortly after the unions had been certified. Moreover, the Board in *Howmet* specifically pointed out that the subcontracting was different in kind and quantity from the employer's prior practice. Thus, the employers therein had failed to meet several of the *Westinghouse* criteria.

[8] Cf. *Cities Service Oil Company*, 158 NLRB 1204 (1966), where the unit's loss of $3,000 (in 1964 dollars) of overtime earnings was held to constitute a significant detriment to the unit employees. In that case, however, unlike the instant case, the subcontract involved approximately one-sixth of the unit's work, the employer had no practice of engaging in "similar wholesale transfer[s] of accounts," and there was no contractual underpinning for the employer's actions.

[9] In other settings, General Motors has successfully improved both productivity and product quality by involving its employees more deeply in the production process, seeking out their ideas through "Quality of Work Life" programs. See "The Reindustrialization of America," Business Week, June 30, 1980, pp. 96-101. The principles involved there would seem equally applicable here.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.